In the Court of Appeal of the State of California

Fifth Appellate District

The People, Plaintiff and Respondent, **v.** **Johnny Aguilar, Jr.**, Defendant and Appellant.	**No. F061462** Fresno County Superior Court No. F09903920

Appeal From The Superior Court Of Fresno County

Honorable Edward Sarkisian, Jr., Judge Presiding

Petition for Rehearing

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Table of Contents

Table of Authorities

Cases

Statutes

Jury Instructions

Rules

Constitutional Provisions

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Introduction

Pursuant to California Rules of Court, rule 8.268,[1] defendant Johnny Aguilar, Jr. respectfully seeks rehearing of this court's January 29, 2013 decision. The opinion (opn) relies on material omissions and misstatements of evidentiary and procedural facts (arg. I, *post*; rule 8.500(c)(2)); an analysis that is unresponsive to the primary issue on appeal and includes improper speculation about defense strategy (arg. II, *post*);[2] and purported harmless error discussions that, against constitutional mandates, simply recite prosecution-favorable evidence (arg. III, *post*).

In sum: As a matter of both law and the historical record, this was an extremely close trial; the *jury* formally declared as much. In failing to acknowledge that, the opinion steers off in several wrong directions. Defendant seeks rehearing, so this court may properly address the issues in light of his arguments, the appellate record, and a consolidated habeas petition.

[1] Further unspecified rule citations are to the California Rules of Court.

[2] Not only improper, but factually inaccurate according to the showing defendant has sought to make via habeas corpus; see arg. II-C, *post*.

Argument

I. The Opinion Omits and/or Misstates Material Evidentiary and Procedural Facts and Case Law Going to the Closeness of the Trial.

Defendant is realistic: while reviewing what happened in the court below, an appellate opinion doesn't simply duplicate the trial. Instead, this court's task is to identify "all the significant facts" in light of the appeal. (*In re S.C.* (2006) 138 Cal.App.4th 396, 402.) What's "significant" in the record, of course, is a matter of context: a reviewing court must "ferret[] out all of the operative facts that affect the resolution of issues tendered on appeal." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113.)

In this appeal, all defendant's claims of trial error (AOB args. I-IV) involve a contrast between two wildly different versions of Mary Bustamonte's death and the Sahara Lodge fire. In the prosecutor's version, defendant made a complete murder-arson confession to his mother (Rebecca Duarte) and sister (Rebekah "Sweetie" Palacios). In the other, defendant himself testified — largely consistent with his post-arrest interrogation — to a complete alibi. The closer that contrast for the jury, the stronger the case for prejudice from any error. (*People v. Covarrubias* (2011) 202 Cal.App.4th 1, 22.) But a relative-closeness analysis can't fairly proceed from a lopsided summary.

A. Evidence

1. Andrew Brand *Didn't* See Defendant "Walking Away From" Bustamonte's Motel Room.

A casual reader of the opinion would be struck by a repeated, damning assertion — that motel resident Brand actually saw defendant *walking away from Bustamonte's room* while the fire's smoke was billowing:

- "When [Brand] noticed smoke emerging from Bustamonte's motel room, defendant was walking away from the room …." (Opn. 2 [Introduction].)
- "As Brand rushed to [Bustamonte's] room, he ran into defendant, who was walking on the second floor balcony, away from Bustamonte's room …." (Opn. 4-5 [Facts — The Fire].)
- "[Defendant] was seen walking away from [Bustamonte's] room as smoke emerged from under the door." (Opn. 61 [partial factor in finding no prejudice from any defense counsel error re confession evidence].)
- "Brand testified that defendant was walking away from [Bustamonte's] room …." (Opn. 62 [another partial factor in finding no prejudice from any defense counsel error re confession evidence].)
- "Andrew Brand testified that he saw defendant walking away from the area of Bustamonte's room …." (Opn. 67 [partial factor in finding no prejudice from any trial court error re admission of alibi-impeaching hearsay and denying confrontation].)

It's no wonder the opinion seizes on this "fact" as an important piece of the harmless error puzzle: had an independent witness identified defendant as coming directly *from the room* where Bustamonte lay dead or dying, that arguably would have been the most inculpatory non-confession evidence at trial — though still refuted by defendant's testimony, of course.

In any event, there was no such "fact" at all. Here's what actually happened; citations are to Brand's testimony and motel photographs introduced as exhibits:[3]

[3] Presumably by sua sponte direction or request, on November 27, 2012, exhibits 1-66, 68-91, 200-234, 236-237, and 244-245 were lodged with this

Brand lived in room 31 on the second floor of the Sahara Lodge's long north-south wing; his was the fourth room from the south end. (6RT 1674, 1682-1683, 1698-1699, 1722; exhibit 75; exhibit 204 [with "ARB" above his door].) There appear to have been approximately 15 rooms along that wing; Bustamonte's room 41 was the second from the "L" turn at the north end. (6RT 1627, 1633, 1636-1637, 1683-1684, 1688; exhibits 1, 75.) After stepping outside and seeing smoke toward the north end of his side of the motel, Brand ran down the south-end stairs behind him, reported a possible fire, then hurried up the same way. (6RT 1675-1676, 1684-1685, 1689-1690, 1700-1701, 1703, 1716, 1722; exhibits 75, 202, 204.) "And as I was going toward the end where the smoke was coming out, [defendant] approached me…." (6RT 1676, 1700-1701.) "He was … walking toward" Brand; i.e., as Brand was going north, defendant "was walking south." (6RT 1677, 1691 [north>south = left>right in photo], 1694; exhibit 75.) When Brand first saw defendant — the fact at issue here — he was "about a quarter of the way from [room] 41 to the … staircase" in the middle of the wing. (6RT 1678, exhibit 75.) Asked to mark defendant's initial location with an "X," Brand placed it in front of what presumably was room 38 or thereabouts — consistent with his testimony, around a quarter of the distance from room 41 to the central stairway. (6RT 1690; exhibit 75.)[4] Brand and defendant met near the top of the central stairway. (6RT 1691, 1701-1702; exhibit 75 [mid-photo circle].)

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court. (http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=5&doc_id=1965225&doc_no=F061462 [docket].)

[4] The rooms presumably were numbered consecutively, increasing from south to north; e.g., Brand's nephew lived in room 40, just south of Bustamonte's room 41. (6RT 1684, 1702-1703.)

While it's true defendant was coming from the *direction* of room 41 — and 40, and 39, and the "L," and the rooms to its left — Brand *didn't* see him "walking from Bustamonte's room" as the opinion repeatedly states.

Defendant's accuracy concern is substantial. He testified that he'd gotten only as close as "about two doors from Mary's" before seeing smoke, turning back, and running into Brand. (9RT 2423, 2429-2430; cf. 10RT 2499 [three or four doors away].) So the two men's versions were perfectly consistent with each other and with defendant's alibi testimony. By contrast, evidence that defendant walked *from room 41 itself* would have been doubly damning — as both impeaching his testimony and providing strong circumstantial evidence of his guilt. Unfortunately, the opinion's legal analysis relies on the non-evidence for those very purposes.

2. Defendant Admitted Initial Uncertainty as to the Smoke's Source and Never Denied Having Seen Smoke.

According to the opinion, after walking upstairs defendant "noticed smoke coming from under the door of room 41." (Opn. 30.) It's true that this statement was included within his testimony. (9RT 2471 [affirming defense counsel's question about "smoke coming from Mary's room"]); 10RT 2499-2500 [same re prosecutor's question].) But initially he testified only as to seeing smoke, not to identifying a source room. (9RT 2423, 2429-2430.) And upon further cross-examination he admitted he couldn't "say in a certain specific location, but I seen smoke …." (10RT 2500-2502; see also 10RT 2546-2547 [defendant told police he saw police but wasn't sure if it was from Bustamonte's room or next door].)

The opinion adds that at one point defendant told Detective Gray "he never saw smoke." (Opn. 33.) But the record doesn't support this assertion. Gray testified defendant said he saw smoke coming from the roof; he

wasn't sure whether it was from Bustamonte's or her neighbor's door. (10RT 2545-2547.) Then defendant made the "never" comment — but in a very different context from the one reported in the opinion: according to Gray, defendant said "'I never told you I saw *smoke coming from Mary's room*.'" (10RT 2547, italics added.) As a "followup question," the officers asked defendant to identify the smoke's specific source, but he responded, "I just *saw smoke*." (10RT 2547.) That is a very far cry from "I 'never saw smoke.'"[5]

3. Prosecution Evidence Showed Not Only That Defendant Was "Seen" Holding a Telephone; He in Fact Called 911.

The opinion acknowledges defendant's testimony about his actions upon seeing smoke upstairs: following Brand's suggestion, he rushed downstairs, called 911, and reported a fire. (Opn. 31.) But for all the opinion reveals, defendant may have simply pretended to make the call as a ruse. Thus, Brand "directed defendant to the motel's payphone, where defendant was later *seen holding the receiver*." (Opn. 2, italics added.) "Brand looked downstairs and saw defendant at the payphone. *Defendant was holding the receiver in his hand*, and he looked upstairs at Brand." (Opn. 5, italics added.) And, among factors supporting a harmless error finding as to alibi-impeaching hearsay, "Brand saw defendant *holding the payphone receiver*, and then he never saw defendant again." (Opn. 67-68, italics added.)

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[5] On cross-examination, Gray reiterated that defendant "said he saw smoke[.]" (10RT 2551.) The detective went on to recount changes in defendant's story, including "I never seen smoke," but the context was a question about "where the smoke was coming from" according to defendant. (10RT 2551.) Viewed as a whole, Gray's testimony makes it clear that defendant denied only identifying Bustamonte's room as the smoke's source.

Unfairly — and significantly — overlooked by the opinion: Detective Gray testified that defendant *in fact* called 911, as he said he did. (10RT 2551-2553.)

B. Procedural Facts

The opinion completely ignores procedural facts that — as a matter of law — support defendant's characterization of the case as close in the context of his issues.[6]

1. Lengthy Deliberations

The opinion characterizes the verdict as resulting from "a lengthy jury trial[.]" (Opn. 2.) The trial's "length" isn't broken down, but it should be: the relative time of jury deliberations supports defendant's argument that the case was close for these jurors. After hearing evidence spanning five whole or partial court days (Oct. 22, 25, 26, 27, and 28, 2010; 1CT 233-241), the jury spent another four such days in deliberation. (Oct. 29, Nov. 1, 2, and 3, 2010; 1CT 242-248.) Despite two counts resulting from a single incident, jurors took more than eleven hours in actual (non-deliberation) time to reach their verdict. (1CT 242-247; cf. *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [12 hours]; see also *People v. Guiton* (1994) 4 Cal.4th 1116, 1130 [in determining whether prejudice occurred, reviewing court must examine entire record, including jury deliberations].)

2. Multiple Readback Requests, Especially re Evidence at Issue

Also missing from the opinion: acknowledgment and analysis of the jury's seven requests for readback of testimony — including *five* involving Sweetie Palacios, with each of those including the hearsay confession at

[6] Defendant briefed these points (AOB 53-55), then re-cited them in his first (granted) rehearing petition (PFR 7).

issue on appeal. (Supp CT 6-7, 9-10; see AOB 29-30.) And of the two other readbacks, one was Duarte's testimony — with the other hearsay confession at issue here. (Supp CT 10.) Thus, the *record shows* the jury had a particularly difficult time with the very evidence whose use defendant challenges on appeal. (Cf. *People v. Dominguez* (2006) 39 Cal.4th 1141, 1160-1161 [jury question suggests "one or more jurors may have been considering" point at issue].) In sum, "[t]he jury deliberated long and hard, troubled (as evidenced by its request for additional [readbacks]) by the matter of defendant's [hearsay confession], the very issue the defense would have developed but for [counsel's omissions]." (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1852, disapproved on another point in *People v. Martinez* (1995) 11 Cal.4th 434, 452; see also *People v. Guiton, supra*, re examination of deliberation record].)

3. Jury *Announced an Impasse*

There's no getting around it: *for defendant's jury*, the case was extremely close. Close enough that after almost six hours of deliberation, jurors announced they were deadlocked: "We have voted several times and are at a standstill. Can you offer us any suggestions so that we can move on?" (1CT 242-244; Supp CT 8; 11RT 2724-2725.) At least as of that point, "necessarily, at least one of the jurors was not persuaded by the strength of the prosecution's evidence. [Citation.]" (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 251-252; see also *Guiton, supra*, re examination of deliberation record].)

4. Jury Reached Lesser Verdict

On the one hand, defendant's conviction was very likely dependent upon the jury accepting Palacios's hearsay-confession testimony (whether

she heard it from defendant, their brother Elias Robert, or both). On the other, that confession described a premeditated and deliberate murder. Yet the jury found defendant guilty only of unpremeditated second-degree murder in count 1. (1CT 249.) "In view of the verdict's reflecting the jury's selective belief in the evidence, we cannot conclude otherwise than that [the error] was prejudicial requiring reversal [citations]." (*People v. Epps* (1981) 122 Cal.App.3d 691, 694, 698; see also *Guiton, supra* [required whole-record examination includes verdict].)

C. Additional Relevant Case Law re Relative Closeness

The opinion ignores defendant's further reliance on established authority showing this case was quite close (AOB 50-51):

- Where, as here, the only direct evidence showing defendant's guilt is a statement that should be viewed with distrust, the case is a close one. (Cf. *People v. Medina* (1974) 41 Cal.App.3d 438, 463 [re accomplice testimony]; CALCRIM No. 358 [including cautionary admonition re defendant's hearsay admission of guilt].)

- The prosecution's case was "not overwhelming or irrefutable" where "t]here was no eyewitness testimony to [Bustamonte's death], and the prosecution presented no physical evidence directly tying [defendant] to the murder." (*People v. Garcia* (2005) 36 Cal.4th 777, 804.)

- An erroneously admitted confession isn't harmless where "a successful prosecution depended on the jury's believing" it. (*Fulminante v. Arizona* (1991) 499 U.S. 279, 297.)

II. The Opinion's Discussion Is Unresponsive to the Primary Issue on Appeal and Includes Improper Speculation About Defense Strategy.

A. Counsel's Corpus Delicti Strategy Wasn't a Reasonable Choice *Not* to Raise Hearsay-Source Issues.

The central analytical problem with the opinion is its erroneous conflation of two *unrelated* questions involving the same trial evidence — defendant's hearsay confessions as reported by Palacios and Duarte:

1. Was defense counsel ineffective in letting that evidence go to the jury without objection or a preliminary fact instruction?

2. Did defense counsel properly argue to the jury that the remaining evidence insufficiently corroborated the confession evidence, so that corpus delicti was unproved?

Question 1 is, of course, the primary issue on appeal. (AOB arg. I.) Defendant argued ineffective assistance; this court finds otherwise. (Opn. 46-63.) Both give question 2 a "Yes" answer. (AOB 42: "There was nothing wrong with [counsel's corpus delicti] strategy, per se." Opn 52: although "counsel's efforts were not successful," "we will not second guess" "his apparent tactical decision to rely on the corpus delicti rule[.]")

The problem is that the opinion treats the second answer as resolving the first issue. (Opn 49-52.) But it does nothing of the sort. The opinion fails to explain — and the record suggests no logical explanation — what would have been reasonable about counsel's "apparent" decision to rely on corpus delicti principles *instead of* directly raising the hearsay-source issue. Why not do both? More importantly, why *didn't* counsel do both? Absent an answer to that question, defendant's issue remains unresolved.

As a reminder, here is how he addressed this very point:

> There was nothing wrong with [counsel's corpus delicti] strategy, per se. If jurors accepted counsel's argument, they could have found that because Dr. Gopal's opinion was inextricably dependent on the hearsay confession (see [AOB] pp. 15-16), defendant must be acquitted of murder. (CALCRIM No. 359.) Under the same theory, an arson acquittal could have been based on evidence that fire investigator Simmons relied on the [Palacios] and Duarte interviews in concluding someone intentionally started the motel fire. (7RT 1790-1791, 1828-1829.) But counsel's strategy hardly justified a hands-off approach to the confession's *admissibility* in the first place.
>
> Given the power of confession evidence in general, and certainly here, counsel could have had no tactical reason to avoid a dual-theory argument. They were perfectly complementary:
>
> (1) Unless you're convinced by a preponderance of evidence that [Palacios] and Duarte really heard confession details directly from defendant, you're required to ignore them. And whatever's left — if anything — isn't enough to pin the charged crimes on defendant beyond a reasonable doubt.
>
> (2) Even *if* you find defendant made some or all of those statements, they can't be used to find him guilty if the homicide and arson opinions weren't truly independent. Because the evidence as a whole suggested those opinions relied on defendant's statements, the corpus delicti rule prevents you from relying on them to reach guilty verdicts.
>
> While there's nothing unreasonable about theory (2), there was no justification for putting put all defense eggs in that basket. In the best-case scenario, the confession evidence would have been excluded in limine, with the jury never hearing it. And at worst, even if admitted, the evidence would have triggered an additional prosecution burden of proof and a very arguable theory in support of not guilty verdicts. (Cf. *People v. Nation* (1980) 26 Cal.3d 169, 179: "Since an objection to the … evidence would have been adjudicated outside the presence of the jury, there could be no satisfactory tactical reason for not making a potentially meritorious objection. [Citation.]")

(AOB 42-43, original italics.)

So the question still to be addressed by this court isn't whether corpus delicti theory was such a decision; it's whether relying on that theory *instead of* a hearsay-source issue may be so characterized. The situation is no different than one where, say, defense counsel makes a proper, though unsuccessful, Fourth Amendment objection to evidence including the defendant's post-arrest confession. If on appeal the defendant challenges counsel's failure to *additionally* raise a Fifth Amendment objection, it's no answer to call the other one a valid "tactical decision." That's simply not the issue.

On the contrary, the fact that counsel *did* challenge the hearsay confession evidence strongly suggests he had no strategic purpose in failing to make an even stronger challenge. (See opn 34, 35-38, 42, 51, 53-54: this court concedes Palacios and Duarte made "inconsistent claims" about their hearsay source(s); a hearsay-source challenge would have been a "valid tactical decision[.]") "[S]ince defendant's trial counsel *did* in fact object to the introduction of the statements, albeit on nonnmeritorious grounds, this fact underscores our conclusion that there could have been no tactical reason for counsel's failure to make a *meritorious* objection to the same evidence. [Citation.])" (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131; cf. *In re Hill* (2011) 198 Cal.App.4th 1008, 1017, 1025 [counsel's duty is to investigate "all possible" defenses and not "planning and executing a defense strategy" without adequate preparation].)

B. The Record and Logic Don't Support the Opinion's Suggestion That Counsel Ignored the Hearsay-Source Legal Issues as an Impeachment Strategy.

According to the opinion, the record suggests an alternative defense strategy not to raise a hearsay-source challenge to admission of the confes-

sion evidence: counsel relied on the witnesses' hearsay-source confusion as general impeachment of their inculpatory testimony. (Opn 59-60.) But again, had counsel successfully excluded that testimony, the defense gain would have been much greater, with impeachment still available as a fall-back strategy.[7] And the opinion here fails to explain why counsel neither requested a preliminary-fact instruction nor made a hearsay-source preliminary fact argument to the jury. (See AOB args. I-E and –F; the latter headnoted point is ignored in the opinion.)

C. This Court Relies on Speculation Without Affording Defendant the Opportunity to Establish Its Inaccuracy.

As discussed in the previous two sections, the opinion finds that defense counsel's approach to the hearsay-source issue was "apparent[ly]" the result of his strategic decisions not to raise the challenges identified on appeal. (Opn 49-52, 59-60.) In the historical context of this case, such a resolution is fundamentally unfair. Because California guarantees the right to appeal (Pen. Code, § 1237), "the procedures used in deciding appeals must comport with the demands of the Due Process . . . Clause[] of the Constitution." (*Evitts v. Lucey* (1985) 469 U.S. 387, 393; U.S. Const., 14th Amend.) They do so only where they afford "adequate and effective appellate review[.]" (*Griffin v. Illinois* (1956) 351 U.S. 12, 20.) Federal due process is

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[7] The opinion declares that had the trial court "excluded any part of" Palacios's and Duarte's testimony, "then defense counsel would not have been able to impeach Palacios and Duarte with the inconsistencies between their initial statements to Detective Gray, their preliminary hearing testimony, and their trial testimony …." (Opn 60.) The opinion doesn't say why that would be so. But as the cross-examining party, counsel would have been able to introduce the witnesses' prior inconsistent statements for impeachment. (Evid. Code, § 1235.) And if by doing so he opened the door to the rest of the statements on redirect, he would have been right where he ended up anyway.

violated where the state "decided the appeal in a way that was arbitrary with respect to the issues involved." (*Evitts v. Lucey, supra,* 469 U.S. 387, 404.)

The opinion introduces its ineffective assistance discussion by noting that this court "must review … defense counsel's tactical decisions before we can fully address defendant's contentions." (Opn 38-39, fn. omitted.) But where the record doesn't reveal those decisions, appellate speculation is inappropriate; the claim "'should generally'" be presented in a habeas corpus petition. (Opn 49, quoting *People v. Diaz* (1992) 3 Cal.4th 495, 557-558.)

As defendant has explained (args. II-A & -B, *ante*, the record doesn't support this court's conclusions that counsel made a tactical decision to forgo hearsay-source challenges. Without such support, the conclusions are speculative and therefore improper. More importantly, they ignore *defendant's formal request to establish the very facts at issue*, via habeas. On June 4, 2012, defendant filed an Application to Expand [the scope of appellate counsel's] Appointment to Include Preparation and Filing of Petition for Writ of Habeas Corpus. (See docket, cited at fn. 3, *ante* at pp. 3-4.) But four days later this court denied the application "for lack of good cause shown."

Defendant submits that this court's opinion helps supply the good cause: given the choice between affirming defendant's murder conviction by guesswork, or affording him a fair opportunity to eliminate that guesswork and establish trial counsel's ineffectiveness, due process mandates the latter. "Judicial imagination is … no substitute for evidence." (*People v. Kluga* (1973) 32 Cal.App.3d 409, 418 (dis. opn. of Kaus, P.J.); see also *Tice v. Johnson* (4th Cir. 2011) 647 F.3d 87, 105: "'courts should not con-

jure up tactical decisions an attorney could have made, but plainly did not.' [Citation.]")

Accordingly, this court should grant rehearing and not rely on a presumed defense strategy without granting defendant's application to present a habeas petition addressing that very point.[8]

D. The Opinion Materially Mischaracterizes the Primary Jury Instruction at Issue.

The opinion finds no problem with counsel's failure to request a preliminary fact instruction, because CALCRIM No. 358 took care of everything such an instruction would have covered. (Opn 57-59.) But the opinion materially misreads the pattern instructions, which did *not* identify a burden *or* standard of proof governing the jury's decision "whether the Defendant made" "oral statements before the trial" according to the evidence. (Opn 59; 10RT 2605-2606.) This court is satisfied that jurors would have turned to the "one instruction on the topic" of burden of proof: CALCRIM No. 220, which had the court saying, "*Whenever I tell you the People must prove something*, I mean they must prove it beyond a reasonable doubt." (Opn. 59; 10RT 2592.)

By its very terms, the CALCRIM 220 burden didn't apply to the CALCRIM 358 scenario. The latter instruction included neither the word "prove," nor any derivatives, nor the concept of either party shouldering a burden to establish a fact. So far from supporting the opinion's conclusion, the instructions refute it. (Cf. *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.): "Although the average layperson may not be familiar with the Latin phrase inclusio unius est exclusio alterius, the

[8] Appellate counsel is preparing a renewed, updated application and expects to file it within the next few days.

deductive concept is commonly understood ….” See also discussion at AOB 52-53, with citation to additional authority.)

Similarly, the opinion characterizes the instructions here as “*identical*” to those approved in *People v. Hinton* (2006) 37 Cal.4th 839, 891-892. (Opn 58-59, original italics.) Not so: *Hinton* was a CALJIC trial (e.g., *id.* at 871, 875-876); defendant’s relied on CALCRIM. And neither the “‘“‘exclusive judges”’” nor “‘“‘must reject”’” language in the opinion’s *Hinton* quotation (opn 58) is included in CALCRIM No. 358.

Moreover, although *Hinton* was satisfied with the instructions as given in that case, the Supreme Court relied in material part on closing arguments: defense counsel expressly argued doubt as to the existence of the preliminary fact and “‘urged the jury to reject the evidence.’” (Opn 58, quoting *Hinton*.) That didn’t happen here; neither attorney explained the preliminary-fact requirement and burden to the jury. As defendant noted in discussing the defense hearsay-source argument, it was “context-free …; counsel didn’t point out that jurors had to find defendant was Sweetie’s direct ‘source’ before they could consider each ‘detail.’” (AOB 28-29; see *People v. Simon* (1995) 9 Cal.4th 493, 506, fn. 10 [*Watson* reversal for instructional error in failing to quantify burden of proof]: “We have reviewed the arguments of counsel in an effort to determine if the nature of the burden might have been conveyed to the jury during closing argument. It was not. ….”. See also *United States v. Solano* (9th Cir. 1993) 10 F.3d 682, 684: “The jury was not told which side had the burden of proof, nor was it told what standard of proof applied.”)

And a final significant distinction is absent from the opinion:

"[J]urors knew they had to decide whether defendant actually 'made any' out-of-court statements about the motel incident. But no instruction identified the hearsay-source issue. So, for example, if the jury found that defendant presumably spoke to Elias Robert, who in turn passed the information to [Palacios] and Duarte, then defendant's original statements had to be 'consider[ed]' in reaching the verdicts. (10RT 2606.)" (AOB 28.) Defendant simplified the problem:

> W testifies that *either D or X* told her that D strangled V; D testifies he said no such thing; and there's no evidence X had anything to do with V. Using the instruction as worded, jurors could find that D "made" extrajudicial oral statements *to X* — because that's the only way X could have learned about D strangling V — and X then repeated the statements to W. In other words, for a reasonable juror, the "D vs. X" — defendant vs. Elias Robert — hearsay-source confusion was a non-issue. Either way, [Palacios]'s testimony pointed to defendant having "made" the "oral statements" that constituted the confession. That would have been faulty reasoning, of course — but there's a reasonable likelihood that jurors adopted it.

(AOB 52, original italics.)

III. In Simply Reciting Prosecution-Favorable Evidence, the Opinion's Harmless Error Discussions Violate Constitutional Mandates.

The opinion finds that if defendant correctly identified errors as to the hearsay-source issue and the alibi-impeachment evidence, reversal is unnecessary; the errors were harmless under the standards established by *Strickland v. Washington* (1984) 466 U.S. 668, 694 [hearsay-source issue; prejudice as component of Sixth Amendment ineffective assistance]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [alibi-impeachment issue; prejudice requiring reversal for state hearsay error]; and *Chapman v. California*

(1967) 386 U.S. 18, 24 [alibi-impeachment confrontation issue; state burden to prove error harmless beyond reasonable doubt]. (Opn 48, 61-63, 67-68.) Taking the same approach to both discussions, the opinion does no more than provide a list of evidentiary items viewed in a judgment-favoring light.[9] But under any and all standards, that's the wrong approach.

Not that it's an unauthorized approach per se: essentially, it's the *proper* test for sufficiency of evidence to support a judgment — "'the familiar substantial evidence rule.'" (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 77.) So it isn't a context-free rule: it's a standard of review governing an appellant's attack on a judgment as unsupported. In other words, it's an element of "[t]he proper test for determining a claim of insufficiency of evidence …." (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

One major problem: defendant made no such claim in this appeal. And "[t]he familiar sufficiency-of-the-evidence analysis centering on whether a reasonable jury could have convicted an adequately represented defendant is considerably more deferential than the *Strickland* test for prejudice in an ineffective-assistance case, which seeks only to discover whether the absence of error would have given rise to a reasonable probability of acquittal, such that confidence in the verdict is undermined. [Citation.]" (*Tice v. Johnson, supra,* 647 F.3d 87, 110.)

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[9] As one notable example, the opinion condemns defendant's trial testimony as "riddled with inconsistencies …." (Opn 67.) But it was the *jury* who saw, heard, and evaluated that testimony, and the *jury* who still had a very difficult time reaching a verdict. Indeed, defendant's testimony was just as "riddled," if not much more so, with *consistencies* — as compared to itself, to his police interview, and to other evidence such as Brand's account of their meeting. In any event, the point here is that the evidence as a whole was very far from one-sided; the jury saw that; and this court has no place substituting its judgment for that of the jury.

The possible errors declared harmless by this court must be analyzed according to state and federal constitutional standards not met in the opinion. They require analysis of the entire relevant record. (*People v. Guiton, supra*, 4 Cal.4th 1116, 1130 [re *Watson*]; see arg. I, *ante*; *Wong v. Belmontes* (2009) 558 U.S. 15 [130 S.Ct. 383, 390; 175 L.Ed.2d 328] ["the reviewing court must consider all the evidence — the good and the bad — when evaluating prejudice"].) The *Strickland* prejudice "inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below." (*Sears v. Upton* (2010) 571 U.S. ___ [130 S.Ct. 3259, 3266].) And particularly in the *Chapman* context, a Court of Appeal erroneously finds harmless error by relying on a judgment-favoring view of the record. (*People v. Mil* (2012) 53 Cal.4th 400, 417-419.)

Conclusion

For the above reasons, defendant urges this court to grant rehearing.

Dated: February 13, 2013

Respectfully submitted,

_____
Stephen Greenberg
Attorney for Appellant
Johnny Aguilar, Jr.

Certificate of Length

I, Stephen Greenberg, counsel for appellant, certify pursuant to rule 8.360(b)(1) that the word count for this document is 4,678 words, excluding the tables and this certificate.

Dated: February 13, 2013

_____
Stephen Greenberg

Proof of Service by Mail

Case: *People v. Johnny Aguilar, Jr.* No. F061462

I am an active member of the State Bar of California (SBN 88495), over 18, and not a party to this action. My business mailing address is P.O. Box 754, Nevada City, CA 95959-0754.

On the date stated below, I served the document(s) described below on each of the listed parties by mailing a copy through the U.S. Postal Service in Sacramento, California.

Document(s):**Petition for Rehearing**

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Executed _____ at Sacramento, California. I declare under penalty of perjury that the foregoing is true and correct.

_____
Stephen Greenberg